



United States Department of the Interior

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Washington, D.C. 20240

MEMORANDUM

TO: Scott A. de la Vega, Director, Departmental Ethics Office & Designated Agency Ethics Official

FROM: Heather C. Gottry, Deputy Director for Program Management and Compliance, Departmental Ethics Office & Alternate Designated Agency Ethics Official *AD*

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DATE: February 19, 2019

RE: Ethics Guidance on How to Categorize Issues, Decisions, and/or Actions Pending at DOI and Involving the Central Valley Project and State Water Project as “Matters,” “Particular Matters of General Applicability,” or “Particular Matters Involving Specific Parties”

This memorandum consolidates and memorializes prior ethics advice and guidance provided by the Department Ethics Office (DEO) about whether issues, decisions, and/or actions pending at the U.S. Department of the Interior (DOI) involving the Central Valley Project (CVP), and coordination of operations with the State Water Project (SWP) should be categorized as “matters,” “particular matters of general applicability,” or “particular matters involving specific parties” pursuant to the definitions of those terms in ethics regulations and guidance from the Office of Government Ethics (OGE). 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *“Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter”* (Oct. 4, 2006) (OGE DO-06-029). As a general matter, while it is clear that there are many broad policy determinations impacting the entire CVP and/or SWP that would not constitute either “particular matters of general applicability” or “particular matters involving specific parties,” case-by-case factual analysis and ethics review will be required in most circumstances in order to determine whether an issue, decision, or action involving the CVP and/or SWP and pending before the DOI should be categorized as a “matter,” “particular matter of general applicability,” or “particular matter involving specific parties”. This categorization will in turn govern whether certain DOI employees may participate in the issue, decision, or action involving the CVP and/or SWP and pending before the DOI, or whether they are required to disqualify themselves or recuse from participation pursuant to 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the requirements of paragraphs 6 and 7 of Executive Order 13770

entitled, “Ethics Commitments by Executive Branch Appointees” (Jan. 28, 2017) (Ethics Pledge).

This memorandum first provides background information on the CVP and the SWP. Second, the memorandum provides a summary of the applicable and governing legal definitions of “matters,” “particular matters of general applicability”, or “particular matters involving specific parties” found in the ethics regulations and other OGE guidance. Third, this memorandum applies these definitions to the deliberations and discussions that resulted in the publication of a *Notice of Intent to Prepare a Draft Environmental Impact Statement, Revisions to the Coordinated Long-Term Operation (LTO) of the CVP and the SWP, and Related Facilities (Draft EIS NOI)* in the Federal Register on December 29, 2017, or the DOI process that resulted in the *Reinitiation of Consultation on the Coordinated LTO of the CVP and SWP, Final Biological Assessment (2019 BA)*, dated January 2019, in order to determine whether they should be categorized as “matters,” “particular matters of general applicability,” or “particular matters involving specific parties” as defined in the ethics regulations. Finally, this memorandum provides general guidance on how the DEO categorizes issues, decisions, and/or actions involving the CVP and/or SWP pending before the DOI as “matters,” “particular matters of general applicability,” or “particular matters involving specific parties.”

I. Background of the CVP and SWP

As set forth in *2019 BA*, Congress authorized the U.S. Bureau of Reclamation (Reclamation)¹ to develop the CVP for the public good of delivering water and generating power, while providing flood protection to downstream communities and protecting water quality for water users within the system.² *2019 BA* at 1.1.1., 1-3. In its authorization to Reclamation, Congress envisioned that the CVP would be composed of a large, complex project integrated across multiple watersheds that Reclamation would operate to ensure the most beneficial use of water released into the system. *Id.*

¹ Reclamation’s mission is to manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public. *2019 BA* at 1-1. Reclamation is the largest wholesale water supplier in the United States, and the nation’s second largest producer of hydroelectric power. *Id.* Its facilities also provide substantial flood control, recreation, and fish and wildlife benefits. *Id.* In California, Reclamation operates the CVP in coordination with the State of California Department of Water Resources’ (DWR) operation of the SWP. *Id.* The mission of the DWR is to manage the water resources of the State of California, in cooperation with other agencies, to benefit the state’s people and to protect, restore, and enhance the natural and human environment. *Id.*

² The Rivers and Harbors Act of 1935 authorized Reclamation to take over the CVP from the State of California and its initial features were authorized for construction. In 1992, Public Law 102-575 included Title 34, the Central Valley Project Improvement Act (CVPIA) that refined water management for the CVP. *2019 BA* at 1.1.1, 1-4. The CVPIA added fish and wildlife mitigation, protection, and restoration as a project purpose with the same priority as water supply, and also added fish and wildlife enhancement as a project purpose with the same priority as power generation. *Id.* In addition, the CVPIA prescribed a number of actions to improve conditions for anadromous fish and provided for other fish and wildlife benefits. The Secretary of the Interior assigned the primary responsibility for carrying out the many provisions of CVPIA to Reclamation and the U.S. Fish and Wildlife Service (USFWS).

Currently, Reclamation operates the CVP consistent with the CVP's federally authorized purposes, which include: river regulation; improvement of navigation; flood control; water supply for irrigation and municipal and industrial uses; fish and wildlife mitigation, protection, and restoration; power generation; and fish and wildlife enhancement. *Id.* at 1.1.1, 1-4. The CVP consists of 20 dams and reservoirs that together can store nearly 12 million acre-feet (MAF) of water. *Id.* at 1-1. Reclamation holds over 270 contracts and agreements for water supplies that depend upon CVP operations. *Id.* Through operation of the CVP, Reclamation delivers water in 29 of California's 58 counties. *Id.* The CVP serves farms, homes, and industry in California's Central Valley as well as the major urban centers in the San Francisco Bay Area; it is also the primary source of water for much of California's wetlands. In addition to delivering water for farms, homes, factories, and the environment, the CVP produces electric power and provides flood protection, navigation, recreation, and water quality benefits. While the CVP's facilities are spread out over hundreds of miles, the CVP is financially and operationally integrated by the DOI as a single large water project.

The SWP is a water storage and delivery system of reservoirs, aqueducts, powerplants, and pumping plants operated by the State of California.³ 2019 BA at 1-1. Its main purpose is to store and distribute water to 29 urban and agricultural water suppliers in Northern California, the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. Of the contracted water supply, 70 percent goes to urban users and 30 percent goes to agricultural users.

In 1986, Congress directed the Secretary of the Interior to execute the Coordinated Operations Agreement (COA) between the CVP and SWP. 2019 BA at 1.1.1, 1-4. The COA between the U.S. Government and the State of California was signed by DWR and Reclamation in 1986. The COA defined CVP and SWP facilities and their water supplies, coordinated operational procedures between the DOI and the State of California, identified formulas for sharing joint responsibility between the DOI and the State of California for meeting Delta standards (such as those in D-1485), identified how unstored flow is shared between the CVP and SWP, and established a framework for exchange of water and services between the projects between the CVP and SWP. *Id.* In 1999, the California State Water Resources Control Board issued D-1641, obligating the CVP and SWP to the 1995 Bay-Delta Water Quality Control Plan. Revised in 2000, D-1641 provided standards for fish and wildlife protection, municipal and industrial water quality, agricultural water quality, and Suisun Marsh salinity. *Id.*

³ The Burns-Porter Act, approved by the California voters in November 1960 (Water Code [Wat. Code] §§ 12930–12944), authorized issuance of bonds for construction of the SWP. DWR's authority to construct state water facilities or projects is derived from the Central Valley Project Act (CVPA) (Wat. Code § 11100 et seq.), the Burns-Porter Act (California Water Resources Development Bond Act) (Wat. Code §§ 12930–12944), the State Contract Act (Pub. Contract Code § 10100 et seq.), the Davis-Dolwig Act (Wat. Code §§ 11900–11925), and special acts of the State Legislature. 2019 BA at 1.1.1, 1-4. In 1978, the SWRCB issued Water Rights Decision 1485 (D-1485). D-1485 required spring outflow and set salinity standards in the Delta while setting standards for the diversion of flows into the Delta during winter and spring. *Id.*

The complex and varied activities of DOI with respect to the CVP and SWP are governed by a variety of laws, including the Water Infrastructure Improvements for the Nation Act (WIIN Act) (Pub. L. 114-322, 130 Stat. 1628). Section 4001 of the WIIN Act directs the Secretary of the Interior and the Secretary of Commerce to provide the maximum quantity of water supplies practicable to CVP contractors and SWP contractors by approving, in accordance with federal and applicable state laws, operations or temporary projects to provide additional water supplies as quickly as possible, based on available information. Consistent with authorizations and directions provided by Congress, the DOI routinely analyzes and takes action on a wide variety of both macro and micro operational and programmatic issues, decisions, and/or actions involving the operation of the CVP and coordination with the SWP.

II. Applicable Legal Definitions of “Matters,” “Particular Matters of General Applicability,” and “Particular Matters Involving Specific Parties”

For purposes of analyzing under ethics laws, regulations, and rules whether and to what extent a DOI employee is required to recuse from participating in a policy, operational and/or programmatic issue, decision, and/or action involving the operation of the CVP and coordination with the SWP depends on whether it is categorized as a matter, particular matter of general applicability, or particular matter involving specific parties. These are terms of art with established meanings defined in ethics laws and regulations as well as guidance from the OGE. 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.201; 5 C.F.R. § 2641.201(h)(1)-(2); OGE DO-06-029, *“Particular Matter Involving Specific Parties,” “Particular Matter,” and “Matter”* (Oct. 4, 2006).

A. Definition of “Matter”

In the context of the ethics statutes and regulations, the unmodified term “matter” can refer to virtually all Government work from the broadest to the most narrow issue, decision, and/or action. OGE DO-06-029 at 10-11. The broad definition of “matter” also includes any “particular matter”, including “particular matters of general applicability” or “particular matters involving specific parties.” *Id* at 11. However, if an issue, decision, and/or action pending at the DOI can be categorized as a “particular matter of general applicability” or a “particular matter involving specific parties” then there are specific recusal and disqualification requirements that will apply to a DOI employee’s participation in the issue, decision, and/or action in question. Such recusal and disqualification requirements may arise if a DOI employee has a financial interest that could be directly and predictably effected by the issue, decision, and/or action, if the DOI employee has a “covered relationship” (such as former employer, former client, spousal employer, *etc.*) with one of the parties involved in the issue, decision, and/or action, or if the DOI employee lobbied on the same particular matter prior to employment with the DOI. These recusal and disqualification requirements will generally not apply if the issue, decision, and/or action is not categorized as either a “particular matter of general applicability” or a “particular matter involving specific parties.”

While the term “matter” is not affirmatively defined in the ethics regulations, for purposes of determining whether the specific recusal and disqualification requirements which apply to “particular matters of general applicability” or “particular matters involving specific

parties" are applicable to an issue, decision, and/or action pending at the DOI, a working definition can be derived from examples in the ethics regulations of the types of issues, decisions, and/or actions that OGE does not consider to be "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3)(Ex. 1)(regulations changing the manner in which depreciation is calculated is not a particular matter, nor is the Social Security Administration's consideration of changes to its appeal procedures for disability claimants); 5 C.F.R. § 2641.201(h)(2)(Ex. 3)(formulation of policies for a nationwide grant program for science education programs targeting elementary school children is not a particular matter).

Therefore, we apply the generally accepted definition that the consideration of broad policy options that are directed to the interests of a large and diverse group of persons, such as health and safety regulations applicable to all employers or a legislative proposal for tax reform would not qualify as either "particular matters of general applicability" or "particular matters involving specific parties." 5 C.F.R. § 2635.402(b)(3). Hereinafter, for purposes of the analysis and discussion in this memorandum, the term "matter" is used to describe the consideration of broad policy options that are directed to the interests of a large and diverse group of persons.

Therefore, if an issue, decision, and/or action pending at the DOI is (1) broad and (2) directed to the interests of a large and diverse group of persons, then the recusal and disqualification requirements found in ethics laws, regulations, and rules for "particular matters of general applicability" and "particular matters involving specific parties" would not apply, and a DOI employee will generally be able to fully participate in the issue, decision, and/or action.⁴

B. Definition of "Particular Matter"

The term "particular matter" means any matter that involves "deliberation, decision, or action that is focused on the interests of specific persons or a discrete and identifiable class of persons." 5 C.F.R. § 2635.402(b)(3); 5 C.F.R. § 2640.103(a)(1).⁵ The term "particular matter", however, "does not extend to the consideration or adoption of broad policy options that are directed to the interests of a large and diverse group of persons." 5 C.F.R. § 2635.402(b)(3). Based on this definition it is clear that "particular matters" may include matters that do not involve specific parties and are not "limited to adversarial proceedings or formal legal relationships." Van Ee v. EPA, 202 F.3d 296, 302 (D.C. Cir. 2000) (Van Ee).⁶

⁴ The term "matter" is found in the one-year post-employment restrictions in 18 U.S.C. § 207(c) and (d) for "senior employees" and "very senior employees." Therefore, those restrictions will be applicable even to issues, decisions, and/or actions at the DOI that are (1) broad and (2) directed to the interests of a large and diverse group of persons. 5 C.F.R. § 2635.402(b)(3).

⁵ Please note that for purposes of the Ethics Pledge, the term "particular matter" has the same meaning as set forth in 18 U.S.C. § 208, and 5 C.F.R. § 2635.402(b)(3). Ethics Pledge, Sec. 2(r).

⁶ In Van Ee, the D.C. Circuit construed 18 U.S.C. § 205(a)(2), which bars executive branch employees and others from "act[ing] as agent or attorney" for others "before any department, agency, [or] court" in connection with certain "covered matters" in which "the United States is a party or has a direct and substantial interest." The D.C. Circuit concluded that 18 U.S.C. § 205(a)(2) does not prohibit the communications which the plaintiff in the case, a career employee, proposed to make:

The term “particular matter” generally covers two categories of matters: “(1) those that involve specific parties, and (2) those that do not involve specific parties but at least focus on the interests of a discrete and identifiable class of persons, such as a particular industry or profession.” OGE DO-06-029 at 8. These two types of particular matters are generally referred to as “particular matters involving specific parties” and “particular matters of general applicability,” and the definitions of each type of “particular matter” is discussed further below starting with the broader category of “particular matter of general applicability.”

1. Definition of “Particular Matter of General Applicability”

A “particular matter of general applicability” is broader than a “particular matter involving specific parties.” 5 C.F.R. § 2641.20(h)(2). A “particular matter of general applicability” does not involve specific parties, but is a matter that focuses on the interests of a discrete and identifiable class, such as a particular industry or profession. *See* OGE DO-06-029 at 8. Examples of “particular matters of general applicability” includes rulemaking, legislation, or policy-making, as long as it is narrowly focused on a discrete and identifiable class such as a particular industry or profession. For instance, a “particular matter of general applicability” at the DOI might include a regulation prescribing safety standards for operators of oil rigs in the Gulf of Mexico or a regulation applicable to all those who have grazing permits on DOI public lands. On the other hand, a land use plan covering a large geographic area and affecting a number of industries (*e.g.*, agriculture, grazing, mining, timber, recreation, wind, solar, and/or geothermal power generation, *etc.*) would not generally constitute a “particular matter of general applicability” but, rather, would still fall within the broader definition of “matter,” as it constitutes a broad policy directed to the interests of a large and diverse group of persons.

2. Definition of “Particular Matter Involving Specific Parties”

The narrowest type of matter under the ethics laws, regulations, and rules is a “particular matter involving specific parties.” Depending on the grammar and structure of the particular statute or regulation, the wording may appear in slightly different forms, but OGE has advised that the meaning remains the same, focusing primarily on the presence of specific parties.⁷ OGE

We hold that § 205 is inapplicable to Van Ee's uncompensated communications on behalf of public interest groups in response to requests by an agency at which he is not employed for public comment on proposed environmental impact statements related to land-use plans; these proceedings lack the particularity required by the statute, will not result in a direct material benefit to the public interest groups, and do not create a real conflict of interest or entail an abuse of position by Van Ee.

Van Ee, 202 F.3d at 298-99. In reaching this conclusion, the D.C. Circuit analyzed the components required in order for an agency issue, action, and/or decision to be categorized as a “particular matter.” This analysis is not limited to 18 U.S.C. § 205, but rather it provides guidance on how to categorize agency issues, actions, and/or decisions for other ethics statutes and regulations, including, but not limited to 18 U.S.C. § 203, 18 U.S.C. § 207, 18 U.S.C. § 208, and 5 C.F.R. § 2635.502.

⁷ For example, in the post-employment statute, the phrase “particular matter . . . which involved a specific party or parties” is used. 18 U.S.C. § 207(a)(1), (a)(2). Similar language is used in 18 U.S.C. §§ 205(c) and 203(c), which describe the limited restrictions on representational activities applicable to

DO-06-029 at 10-11. As set forth in 5 C.F.R. § 2641.201(h)(1), a particular matter involving specific parties “typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.” Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties. 5 C.F.R. § 2641.201(h)(2). The regulations further advise that “[i]nternational agreements, such as treaties and trade agreements, must be evaluated in light of all relevant circumstances to determine whether they should be considered particular matters involving specific parties; relevant considerations include such factors as whether the agreement focuses on a specific property or territory, a specific claim, or addresses a large number of diverse issues or economic interests.” *Id.*; *see also* OGE DO-06-029 at 2-5.

Additionally, in its preamble to the final rule implementing 5 C.F.R. part 2641, the OGE stated that “OGE does not necessarily equate ‘Government program’ with ‘particular matter involving specific parties.’ For one thing, some Government programs are not even, in and of themselves, particular matters involving specific parties. For example, a Government program to understand the causes of a particular disease is not, in and of itself, a particular matter involving specific parties, even though the program may involve several grants, contracts or cooperative agreements all designed to support or implement different aspects of the overall program. *See, e.g., OGE Informal Advisory Letter 80 x 9; 5 C.F.R. § 2637.201(c)(1) (Ex. 4).*” *Post-Employment Conflict of Interest Restrictions Action: Final Rule*, 73 Fed. Reg. 36168, 36177 (June 25, 2008).

special Government employees. In contrast, 18 U.S.C. § 208 generally uses the broader phrase “particular matter” to describe the matters from which employees must recuse themselves because of a financial interest. However, even this statute has one provision, dealing with certain Indian birthright interests, that refers to particular matters involving certain Indian entities as “a specific party or parties.” 18 U.S.C. § 208(b)(4); *see OGE Informal Advisory Letter 00 x 12*. OGE has also issued certain regulatory exemptions, under 18 U.S.C. § 208(b)(2), that refer to particular matters involving specific parties. 5 C.F.R. § 2640.202(a), (b). Additionally, the distinction between “particular matters involving specific parties” and broader types of particular matters (*i.e.*, those that have general applicability to an entire class of persons) is crucial to several other regulatory exemptions issued by OGE under 18 U.S.C. § 208(b)(2). 5 C.F.R. §§ 2640.201(c)(2), (d); 2640.202(c); 2640.203(b), (g). OGE has used similar language in various other rules. Most notably, the provisions dealing with impartiality and extraordinary payments in subpart E of the Standards of Ethical Conduct for Employees of the Executive Branch refer to particular matters in which certain persons are specific parties. 5 C.F.R. §§ 2635.502; 2635.503. OGE also uses the phrase to describe a restriction on the compensated speaking, teaching and writing activities of certain special Government employees. 5 C.F.R. § 2635.807(a)(2)(i)(4). The Ethics Pledge states that for purposes of paragraphs 6 and 7 the term “particular matter involving specific parties” will be defined as set forth in 5 C.F.R. § 2641.201(h) “except that it shall also include any meeting or other communication relating to the performance of one’s official duties with a former employer or former client, unless the communication applies to a particular matter of general applicability and participation in the meeting or other event is open to all interested parties.” Ethics Pledge, Sec. 2(s).

III. Analysis of Whether the *Draft EIS NOI* or *2019 BA* Should Be Categorized as “Matters,” “Particular Matters of General Applicability,” or “Particular Matters Involving Specific Parties”

A. The *Draft EIS NOI* is a “Matter”

On December 29, 2017, Reclamation published the *Draft EIS NOI*⁸ which set forth Reclamation’s intent to prepare a programmatic environmental impact statement for analyzing potential modifications to the continued LTO of the CVP, for its authorized purposes, in a coordinated manner with the SWP, for its authorized purposes. *Draft EIS NOI*, 82 Fed. Reg. 61789 (Dec. 29, 2017). Reclamation proposed to evaluate alternatives that maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species. *Id.* Reclamation sought suggestions and information on the alternatives and topics to be addressed and any other important issues related to the proposed action. *Id.*

After review, the DEO has determined that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* do not constitute a “particular matter” (either a “particular matter involving specific parties” or a “particular matter of general applicability”) and, therefore, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and

⁸ Under the National Environmental Policy Act (NEPA), codified at 42 C.F.R. §4321 *et seq.*, a Federal agency must prepare an environmental impact statement (EIS) if it is proposing a major federal action significantly affecting the quality of the human environment. In this case, Reclamation and DWR propose to continue the long-term operation of the CVP and SWP to maximize water supply delivery and optimize power generation consistent with applicable laws, contractual obligations, and agreement; and to increase operational flexibility by focusing on non-operational measures to avoid significant adverse effects. Reclamation and DWR propose to store, divert, and convey water in accordance with existing water contracts and agreements, including water service and repayment contracts, settlement contracts, exchange contracts, and refuge deliveries, consistent with water rights and applicable laws and regulations. The proposed action includes habitat restoration that would not otherwise occur and provides specific commitments for habitat restoration.

The EIS process begins with publication of a Notice of Intent (NOI), stating the agency’s intent to prepare an EIS for a particular proposal. The NOI is published in the Federal Register, and provides some basic information on the proposed action in preparation for the scoping process. The NOI provides a brief description of the proposed action and possible alternatives. It also describes the agency’s proposed scoping process, including any meetings and how the public can get involved. The NOI will also contain an agency point of contact who can answer questions about the proposed action and the NEPA process. The scoping process is the best time to identify issues, determine points of contact, establish project schedules, and provide recommendations to the agency. The overall goal is to define the scope of issues to be addressed in depth in the analyses that will be included in the EIS.

interpretations of Environmental Impact Statements and is supported by the decision of the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in Van Ee.

As discussed in Van Ee, whether an administrative proceeding is a “particular matter” is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Van Ee, 202 F.3d at 309. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties is the proceeding considered a particular matter. *Id.* In Van Ee, the D.C. Circuit examined whether the public comment phase on a proposed EIS related to land use plans was a “particular matter,” and determined that because the focus of the decision to be made by the agency following the public comment phase on the proposed EIS was not on the interests of particular groups or individuals, the public comment phase of a proposed EIS on a land use plan did not constitute a “particular matter.” *Id.*

In this instance, Section VIII of the *Draft EIS NOI* identifies the following purposes: (1) to advise other agencies, CVP and SWP water users and power customers, affected tribes, and the public of Reclamation’s intention to gather information to support the preparation of an EIS; (2) to obtain suggestions and information from other agencies, interested parties, and the public on the scope of alternatives and issues to be addressed in the EIS; and (3) to identify important issues raised by the public related to the development and implementation of the proposed action. *Draft EIS NOI*, 82 Fed. Reg. at 61791. Similar to the facts underlying the D.C. Circuit’s decision in Van Ee, the deliberations and discussions leading up to the publication of the *Draft EIS NOI* and the potential impact of the EIS itself was not focused on the interests of a discrete and identifiable class of persons and, accordingly, it should not be categorized as a “particular matter” but rather as a “matter” as defined above.

In Van Ee, the D.C. Circuit noted the types of proposed actions generally set forth in EISs are focused on diverse sets of interests, such as how to reconcile or balance recreational, conservation, and commercial interests in a land use plan covering considerable territory. Van Ee, 202 F.3d at 309. Similarly, Section II of the *Draft EIS NOI*, notes that Reclamation intends to analyze potential modifications to the LTO of the CVP, in a coordinated manner with the SWP, to achieve the following goals:

- Maximize water supply delivery, consistent with applicable law, contracts and agreements, considering new and/or modified storage and export facilities.
- Review and consider modifications to regulatory requirements, including existing Reasonable and Prudent Alternative actions identified in the Biological Opinions issued by the USFWS and NMFS in 2008 and 2009, respectively.
- Evaluate stressors on fish other than CVP and SWP operations, beneficial non-flow measures to decrease stressors, and habitat restoration and other beneficial measures for improving targeted fish populations.
- Evaluate potential changes in laws, regulations and infrastructure that may benefit power marketability.

Draft EIS NOI, 82 Fed. Reg. at 61790. Additionally, Section III of the *Draft EIS NOI* states: “[t]he purpose of the action considered in this EIS is to continue the operation of

the CVP in a coordinated manner with the SWP, for its authorized purposes, in a manner that enables Reclamation and California Department of Water Resources to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements; and to augment operational flexibility by addressing the status of listed species.” *Id.*

Sections II and III of the *Draft EIS NOI* establish that the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, focused on the broad policy option of remedying reduced availability of water for delivery south of the Delta by continuing operation of the CVP in a coordinated manner with the SWP in a manner that enables Reclamation and DWR to maximize water deliveries and optimize marketable power generation, consistent with applicable laws, contractual obligations, and agreements, while augmenting operational flexibility by addressing the status of listed species.

These discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, they are not appropriately categorized as “particular matters” as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) (“particular matters involving specific parties”), or 5 C.F.R. § 2641.201(h)(2) (“particular matters of general applicability”). Rather, they were focused on the broad policy of restoring, at least in part, water supply, in consideration of all of the authorized purposes of the CVP as discussed in greater detail above. Accordingly, the discussions and deliberations leading up to the decision to issue the *Draft EIS NOI*, and the publication of the *Draft EIS NOI*, are appropriately categorized as “matters” and do not trigger the specific recusal and disqualification requirements that are applicable when an issue, decision, and/or action pending at the DOI is a “particular matter of general applicability” or a “particular matter involving specific parties.” Consistent with this, DOI employees would not be required to recuse from participation in the *Draft EIS NOI* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

B. The 2019 BA is a “Matter”

On August 2, 2016, Reclamation and DWR⁹ requested reinitiation of Section 7 consultation under the Endangered Species Act of 1973 (ESA), codified at 16 U.S.C. § 1531 *et*

⁹ While 5 C.F.R. § 2641.201(h)(1) includes “application” as an example of a “particular matter involving specific parties,” in this case, DWR should not be considered an applicant as the word is traditionally defined. While DWR was listed as an applicant for the reinitiation of Section 7 consultation in 2016, they are not included as an author of the 2019 BA. Indeed, based on available information, DWR is not applying for a specific permit or license to carry out an activity through the consultation process. Instead, DWR, along with BOR, requested reinitiation of formal consultation under Section 7 of the ESA on the continued operation of the CVP and the SWP, both of which are massive water projects serving multiple purposes throughout a large portion of the State of California. Further, under the consultation process set forth in Section 7 of the ESA, only federal agencies can request consultation from the USFWS and the NMFS to review the impacts proposed significant federal action. 16 U.S.C. § 1536. Accordingly,

seq., with the United States Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) on the Coordinated LTO of the CVP and SWP.¹⁰ *2019 BA* at 1-1. The USFWS accepted the reinitiation request on August 3, 2016, and the NMFS accepted the reinitiation request on August 17, 2016. *Id.* The *2019 BA* supports Reclamation's consultation under Section 7 of the ESA, and documents the potential effects of the proposed actions¹¹ to provide

identification of DWR as part of the "application" for the reinitiation request does not act to convert the *2019 BA* into a "particular matter involving specific parties."

¹⁰ As codified in 16 U.S.C. § 1531, the purpose of the ESA is to protect and recover imperiled species and the ecosystems upon which they depend. It is administered by the USFWS and the NMFS. The USFWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish, such as salmon. Under the ESA, species may be listed as either endangered or threatened. "Endangered" means a species is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6). "Threatened" means a species is likely to become endangered within the foreseeable future. 16 U.S.C. § 1532(20). All species of plants and animals, except pest insects, are eligible for listing as endangered or threatened. For the purposes of the ESA, Congress defined species to include subspecies, varieties, and, for vertebrates, distinct population segments.

The ESA directs all Federal agencies to work to conserve endangered and threatened species and to use their authorities to further the purposes of the ESA. Section 7 of the ESA, called "Interagency Cooperation," is the mechanism by which Federal agencies ensure the actions they take, including those they fund or authorize, do not jeopardize the existence of any listed species or adversely modify or destroy critical habitats. 16 U.S.C. § 1536. Under Section 7, Federal agencies must consult with the USFWS (and/or NMFS as appropriate) when any action the agency carries out, funds, or authorizes (such as through a permit) *may affect* a listed endangered or threatened species. This process often begins as informal consultation. *Id.* A Federal agency, in the early stages of project planning, approaches the USFWS (and/or NMFS as appropriate) and requests informal consultation. Discussions between the agencies may include what types of listed species may occur in the proposed action area, and what effect the proposed action may have on those species. If it appears that the agency's action may affect a listed species, that agency may then prepare a biological assessment to assist in its determination of the project's effect on a species. 16 U.S.C. § 1536(c).

When a Federal agency determines, through a biological assessment or other review, that its action is *likely to adversely affect* a listed species, the agency submits to the USFWS (and/or NMFS as appropriate) a request for formal consultation. During formal consultation, the USFWS (and/or NMFS as appropriate) and the agency share information about the proposed project and the species likely to be affected. Formal consultation may last up to 90 days, after which the USFWS (and/or NMFS as appropriate) will prepare a biological opinion on whether the proposed activity will *jeopardize* the continued existence of a listed species. The USFWS (and/or NMFS as appropriate) has 45 days after completion of formal consultation to write the opinion. Please note that these timeframes may be extended upon agreement between the action agency and the services the USFWS (and/or NMFS as appropriate).

¹¹ The proposed action analyzed in the *2019 BA* centers on a Core Water Operation that provides for Reclamation and DWR to operate the CVP and SWP for water supply and to meet the requirements of State Water Resources Control Board (SWRCB) Water Right Decision 1641 (D-1641), along with other project purposes. *2019 BA* at 1-2. The Core Water Operation consists of operational actions that do not require subsequent concurrence or extensive coordination to define annual operation. *Id.* The proposed action also includes conservation measures designed to minimize or reduce the effects of the action on listed species. *Id.* In addition, the *2019 BA* and resulting consultation evaluates actions that will require

operational flexibility for the CVP and SWP, large-scale government programs that divert, store, and convey water throughout California for various purposes, on federally listed endangered and threatened species that have the potential to occur in the action area and critical habitat for these species. *Id.* It also fulfills consultation requirements for the Magnuson-Stevens Fishery Conservation and Management Act of 1976 for Essential Fish Habitat. *Id.*

As set forth in the *2019 BA*, several factors resulted in Reclamation requesting reinitiation of consultation under the ESA, including the apparent decline in the status of several listed species, new information related to recent multiple years of drought, and the evaluation of best available science. <https://www.usbr.gov/mp/bdo/lto.html>. The coordinated long-term operations of the CVP and SWP are currently subject to 2008 and 2009 biological opinions issued pursuant to Section 7 of the ESA. *2019 BA* at 1.1.2, 1-4-5. Each of these biological opinions included Reasonable and Prudent Alternatives to avoid the likelihood of jeopardizing the continued existence of listed species, or the destruction or adverse modification of critical habitat that were the subject of consultation. *Id.* In the *2019 BA*, Reclamation proposes to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility by addressing the status of listed species. <https://www.usbr.gov/mp/bdo/lto.html>.

After review, the DEO has determined that the *2019 BA* should not be categorized as either a “particular matter involving specific parties” or a “particular matter of general applicability,” but rather as a “matter” as defined for purposes of this memorandum. Therefore, DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge. This decision is consistent with prior DEO analysis and interpretations of Biological Assessments (BAs) and Biological Opinions issued pursuant to the requirements of the ESA, and is supported by the decision of the D.C. Circuit in Van Ee.

Generally, a BA is a compilation of the information prepared by or under the direction of a Federal agency as part of its Section 7 consultation concerning listed and proposed species and designated and proposed critical habitat that may be present in the action area and the evaluation of potential effects of the action on such species and habitat. 16 U.S.C. § 1536(c). A BA evaluates the potential effects of the action on listed and proposed species and designated and proposed critical habitat and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.*

The *2019 BA* analyzes and includes as an environmental baseline, the past and present impacts of all federal, state, and private actions and other human activities in the action area, the anticipated impacts of all proposed federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of certain state or private actions that are contemporaneous with the consultation in process, including the past and present

further development and may change during repeated implementation as more information becomes available (*i.e.*, “adaptive management”). Adaptively managed actions will require additional coordination prior to implementation through program-specific teams established by Reclamation and DWR with input and participation from partner agencies and stakeholders. *Id.*

impacts of CVP and SWP operations under 2008 and 2009 biological opinions. *2019 BA* at 3-1-21. The BA also analyzes the effects of multiple physical, hydrological, and biological alterations that have negatively affected the species and habitat considered in the consultation with the USFWS and NMFS, including past, present, and ongoing effects of the existence of the CVP structures, as well as disconnected floodplains and drained tidal wetlands, levees, gold and gravel mining, gravel, timber production, marijuana cultivation, large woody debris, alterations to address effects, fish passage, spawning and rearing habitat augmentation, tidal marsh restoration, *etc.* *Id.* The *2019 BA* also sets forth a series of proposed actions that – if implemented – will work to maximize water deliveries and optimize marketable power generation consistent with applicable laws, contractual obligations, and agreements, and to augment operational flexibility while minimizing impact to listed species. *2019 BA* at 4-1-62; 5-1-498; 6-1-4.

Additionally, applying the D.C. Circuit's decision in *Van Ee*, BAs generally may not even constitute "particular matters," let alone "particular matters involving specific parties." As noted by the D.C. Circuit in *Van Ee*: "...whether an administrative proceeding is a 'particular matter' . . . is determined by the nature and focus of the governmental decision to be made or action to be taken as a result of the proceeding. Only where the decision is focused on a probable particularized impact on discrete and identifiable parties [is it a particular matter]." *Van Ee*, 202 F.3d at 309. As discussed above, the *2019 BA* is not focused on a probable particularized impact on discrete and identifiable parties. Instead, the *2019 BA* evaluates the potential effects of the action on a number of listed and proposed species and designated and proposed critical habitats, and determines whether any such species or habitat are likely to be adversely affected by the proposed actions and is used in determining whether formal consultation or a conference is necessary. *Id.* Moreover, the numerous proposed actions that the *2019 BA* discusses will work together to provide additional operational flexibility for the continued operation of the CVP and SWP, both of which, as described above in greater detail, are federal and state government projects that are enormous in geographical extent and impact on the people, wildlife, and environment of California. As a result, the proposed actions under review in the *2019 BA* take into account and have the potential to impact a wide and diverse sets of interests, and the *2019 BA* analyzes how to reconcile or balance recreational, conservation, and commercial interests in the operation of the CVP and SWP.

Accordingly, even though some of the issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* may have a discernible impact on the interests of certain identifiable parties, the overall impact and focus of the proposed actions and decisions to be made are of a much broader nature, including the avoidance of jeopardizing the continued existence of a listed species and the destruction or adverse modification of designated critical habitat in connection with the continued operation of the CVP and the SWP. Consistent with this, the DOI's work on the *2019 BA* did not focus on the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case; or on the interests of a discrete and identifiable class of persons. Therefore, it is not appropriately categorized as a "particular matter" as defined in 5 C.F.R. § 2635.402(b)(3), 5 C.F.R. § 2640.103(a)(1), 5 C.F.R. § 2641.201(h)(1) ("particular matters involving specific parties"), or 5

C.F.R. § 2641.201(h)(2) (“particular matters of general applicability”). The *2019 BA* considered a wide range of diverse issues related to and the interests of the environmental, agricultural, industrial, municipal, business, academic, and recreational sectors. As result, the DOI’s work on the *2019 BA* involved multifaceted discussions among representatives of those numerous sections and industries in a process that more closely resembles legislative policymaking than contracting, litigation, or negotiations. The issues, decisions, and actions undertaken by the DOI with respect to the preparation, development, drafting, discussion, and submission of the *2019 BA* are therefore appropriately characterized as a “matter” as defined for purposes of this memorandum, and DOI employees would not be required to recuse from participation in the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

IV. Guidance On Assessing Whether Issues, Decisions, and/or Actions Involving the CVP and/or SWP Are “Matters,” “Particular Matters of General Applicability,” or “Particular Matters Involving Specific Parties”

As set forth in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are appropriately categorized as “matters” as defined in this memorandum. It is important to note that as work on the *Draft EIS NOI* and the *2019 BA* continues, it is possible that certain aspects of each, such as the implementation of certain underlying actions, interpretation of specific requirements, or the application of decisions on one sector, could develop into “particular matters of general applicability” or “particular matters involving specific parties.” This, in turn, can implicate the recusal or disqualification requirements of 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

Accordingly, DOI employees should not assume that the conclusions of this memorandum are applicable to every EIS or BA, or to the entire lifecycle of either the *Draft EIS NOI* or the *2019 BA* at the DOI. Further, while the CVP and SWP projects taken as a whole at DOI are “matters” as defined in this memorandum, DOI employees should not conclude that each issue, decision, and/or action that impacts the CVP or SWP are also “matters.” Instead, the DEO recommends that DOI employees assess whether the issues, decisions, and/or actions that they undertake with respect to the CVP and the SWP are best categorized as:

- broad policy options that are directed to the interests of a large and diverse group of persons;
- an issue, decision, and/or action focused on the interests of a discrete and identifiable class, such as a particular industry or profession; or
- a specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case.

In order to assist DOI employees in categorizing their work on CVP and SWP issues, decisions, and/or actions pending before the DOI, the DEO has prepared the chart below as a general reference guide. It sets forth the three general categories under the ethics laws and regulations and includes examples of certain issues, decisions, and/or actions involving the CVP

and SWP that could potentially be categorized as “matters,” “particular matters of general applicability,” or “particular matters involving specific parties.”

<u>CATEGORIES</u>	<u>EXAMPLES</u>
<p>“Matters” as defined in this memorandum</p> <ul style="list-style-type: none"> • <u>Broad policy options</u> that are directed to the interests of a <u>large and diverse group of persons</u> 	<ul style="list-style-type: none"> • <i>Draft EIS NOI</i> [as described above] • <i>2019 BA</i> [as described above] • Issue, decision, and/or action that impacts all industries and sectors involved with the CVP and/or SWP • CVP-wide operational and programmatic policy decisions
<p>“Particular Matters of General Applicability”</p> <ul style="list-style-type: none"> • Issue, decision, and/or action <u>focused on the interests of a discrete and identifiable class</u>, such as a particular industry or profession 	<ul style="list-style-type: none"> • Issue impacting only the agricultural industry involved with the CVP and/or SWP • Decision limited only to hydroelectric power generators • Action focused only on municipal water issues • Anything that impacts an entire sector and/or industry or a subset of sectors and/or industries involved with and impacted by the CVP and/or SWP
<p>“Particular Matters Involving Specific Parties”</p> <ul style="list-style-type: none"> • Specific proceeding affecting the legal rights of certain parties or an isolatable transaction or related set of transactions between identified parties 	<ul style="list-style-type: none"> • CVP Water Contracts • Litigation • Settlement Agreements • Permit for a specific party or parties • Specific request from individual(s) or entity(ies)

In every case, the categorization of issues, decisions, and/or actions will depend on the specific facts involved, and the DEO is available to provide specific guidance and assistance in making such determinations.

V. Conclusion

This memorandum reflects the current analysis and guidance of the DEO on how the types of issues, decisions, and/or actions involving the CVP and the DOI’s coordination of operations with the SWP, should be categorized as “matters,” “particular matters of general applicability,” or “particular matters involving specific parties” pursuant to the definitions of those terms in ethics regulations and guidance from the OGE. As discussed in greater detail above, the DEO has determined that both the *Draft EIS NOI* and the *2019 BA* are “matters” as defined in this memorandum and, as such, DOI employees would not be required to recuse from participation in either the *Draft EIS NOI* or the *2019 BA* under 18 U.S.C. § 208, 5 C.F.R. § 2635.502, or the Ethics Pledge.

While there are other similar broad policy determinations impacting the entire CVP and/or SWP that would not constitute either “particular matters of general applicability” or “particular matters involving specific parties,” the DEO notes that case-by-case factual analysis and ethics review will be required in many, if not most, circumstances in order to determine the appropriate categorization of issues, decisions, and/or actions undertaken at the DOI with respect to the CVP and the SWP. The DEO is available to provide further ethics guidance on this and other issues upon request.